

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1182
76-1192

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P/S

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

-ag-inst-

LOUIS BOVELL,

Defendant-Appellant.

*On Appeal from the United States District Court for the Eastern
District of New York.*

BRIEF FOR DEFENDANT-APPELLANT

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76 - 1192

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
WILLIAM J. JOYCE, et al.,
Defendant-Appellants.

BRIEF FOR APPELLANT
LOUIS BOVELL

Preliminary Statement

The defendant was indicted under two counts for the crimes of conspiracy to possess goods stolen from interstate commerce and unlawful possession of such goods in violation of 18 U.S.C. §§ 371, 659 and 2.

The defendant was found guilty of both counts after trial. On April 9, 1976, the defendant was sentenced to three years on each count, to be confined for a period of six months on each. The defendant appeals from the aforesaid judgment.

STATEMENT OF FACTS

This case arises from the theft on March 17, 1975 from Kennedy Airport of 117 cartons of Timex watches which were moving in interstate commerce. The defendant Schoenly testified that the defendant Joyce informed him that Joyce "had made a hit at the airport." (T 82). The defendant Areiter testified that on March 17, 1975, he was requested by the defendant Joyce to help move "cartons". (T 275). Areiter and the defendant Bovell proceeded to a garage where the cartons were transferred from one truck to another (T 293). The cartons were then driven to Lynbrook (T 295) and placed in the house of the defendant Terri (T 296). On March 21, the defendant Schoenly testified, he was requested by the defendant Walsh to assist in the movement of the stolen shipment (T 38) and rented a truck to effect the transfer (T 90-92). The defendant Bovell, at the request of the defendant Walsh

accompanied Schoenly and helped in the move. (T 98)). Schoenly testified that he had no conversation with the defendant Bovell with respect to the goods transferred (T 234).

The defendant Bovell testified that he had been a truck driver and mover for 18 years. (T 1085). He was requested by Walsh, a friend of several years standing to help in a "small move" for which he would be paid (T 1086). The defendant Bovell moved the stolen goods from a garage to the house of the defendant Terri (T 1088-1089) and subsequently helped in removing the goods from the aforesaid house (T 1092).

The defendant Bovell and his co-defendants testified that he was never informed that the goods in question were stolen. (T 1097). Bovell denied guilty knowledge to the FBI (T 1095). He testified that he was a professional trucker and mover who assisted Walsh as a favor. He testified that he had previously assisted Walsh in a move of household goods. (T.1097). Bovell, an 18 year veteran of the moving business, testified that he had often worked a 14 hour day, had no interest in the nature of the goods he moved and had no reason to examine the packages transferred (T 1089).

The Court deemed itself bothered by the nature of the case against Bovell. It stated that it was entirely possible that the defendant's counsel could lend a hand to "earn an extra buck over the weekend and unload cartons and not know anything about it." (T 957). Nevertheless, the Court submitted the case to the jury and instructed it that it could find that the defendant Bovell knew of the theft if "a man of ordinary intelligence" should have known. (T 1478).

QUESTIONS PRESENTED

- 1.) Where the court charged the jury that it could find that the defendant had actual knowledge of the stolen nature of the goods possessed by him if a man of ordinary intelligence should have had such knowledge, did such charge constitute error in the light of the facts of this case?
- 2.) Where the evidence against the defendant was circumstantial, he offered a reasonable explanation of his possession, the Court noted the flimsy nature of the prosecution's case against him and a co-defendant was acquitted of one charge on stronger evidence, was the guilt of the defendant proven beyond a reasonable doubt?

POINT I

THE CHARGE OF THE COURT BELOW
WAS ERRONEOUS AND PREJUDICIAL
WITH RESPECT TO THE QUESTION
OF KNOWLEDGE.

Guilty knowledge is a necessary element of the crime of receiving stolen goods and must be proven beyond a reasonable doubt. This Circuit has made clear that the test to be applied is a subjective one, i.e., the government must prove that the defendant, himself, "actually knew" that the property of which he had custody was stolen.* In determining knowledge, the jury may consider circumstantial evidence and where, as here, there is no direct evidence of knowledge, it may be inferred from various facts and circumstances, particularly those surrounding the receipt of the goods. Each juror makes his own assessment of the circumstantial evidence adduced and unquestionably adds to the calculus his own judgment as to whether or not under the circumstances demonstrated by the evidence to have existed, he would have known or suspected that the goods in question were stolen.

* United States v. Fields, 406 F. 2d 119 (2d Cir. 1972)

If a juror believes that he would have known, he is well on his way to concluding that the defendant "knew". Thus, although this court has spoken in terms of a defendant's actual knowledge, the state of that knowledge is of necessity gauged to a large extent by the personal judgment of each juror as to how he would have reacted under the same circumstances.

It is, therefore, clear that although a totally subjective test is mandated by judicial language, the enunciated standard is diluted by the influence exerted in the evaluation process by each juror's personal and peculiar temperament, intelligence and experience. In this case, the trial court further diluted the standard by instructing the jury that "[k]nowledge that the goods have been stolen may be inferred from circumstances that would convince a man of ordinary intelligence that this is a fact." (T 14781 emphasis added)*. Thus, the charge given by the court to the jury focused the attention of its members on the knowledge of some hypothetical "ordinary" man, rather than that of the defendant himself, whose intelligence was not a matter of inquiry.

* The letter T denotes transcript.

The "intelligent man" test and its various counterparts, the "reasonable man" and the "prudent man", have been rejected by this and other circuits. In United States v. Werner,* Judge Learned Hand stated that decisions which predicate knowledge of a particular defendant what "a reasonable man in the receiver's position would have supposed" are "wrong" and that "the better law is otherwise." ** Obviously, a law which measures a defendant's knowledge by the "intelligent man" standard invites a conviction for stupidity rather than guilt. *** As one writer has aptly stated:

Knowledge and wisdom, far from being one,
Haft oftentimes no connection.****

Further, in determining that a man of ordinary intelligence should have been convinced that the goods in question were stolen, a juror is somewhat analogous to football's famous quarterback who knows on Monday the plays that should have been called the Saturday before. It is far easier, indeed,

* 160 F. 2d 438 (2d Cir. 1947)

** Citing, Peterson v. United States, 9 Cir., 213 F. 920, 922; Kasle v. United States, 6 Cir., 233 F. 878, 888; Pounds v. United States, 7 Cir., 265 F. 242, 245; Stemple v. United States, 4 Cir., 287 F. 132.

*** See, Kasle v. United States, supra.

**** William Cowper, The Task VI

to say after a theft has been certified, that a person should have known of it than it is to reach that same conclusion when the theft has not yet been uncovered. That hindsight is better than foresight is an adage based upon experience and the wisdom which arises after the event has been observed by many writers from Homer on.

In the instant case, the court's instruction that circumstances which should have convinced a man of ordinary intelligence that the goods in question were stolen should have convinced the defendant herein was particularly damaging since the defendant Bovell was, by virtue of his prior experience, in some respects unique. The prosecutor laid great stress upon the defendant Bovell's lack of curiosity as to the contents of the packages he handled and the fact that although he observed certain labels or markings thereon, he failed to read them. The prosecutor commented upon Mr. Bovell's lack of interest in the contents of the boxes, stating, "I suggest it's just not believable." (T. 1338). However, the testimony of the defendant Bovell revealed that he was a trucker who loaded and unloaded, as well as drove, and had been employed as such for eighteen years. (T. 1085).

On some days he worked 12 to 14 hours. On the day in question, he had worked 8 or 9. (T. 1168). The defendant testified that he was engaged in hard, physical work not only on a regular basis, but that he had also undertaken occasional extra moving jobs in order to obtain additional money. (T. 1223). In short, the defendant Bovell had spent 18 years of his life, up to 14 hours a day, moving furniture and boxes, and had no interest in the specific nature of the contents of the boxes he was "hefting" at the request of a friend. It would be more than reasonable for the jury to conclude that Mr. Bovell, who testified that he had "unloaded a lot of cartons" in 18 years, (T. 1097), understandably had little curiosity as to what he was unloading on the particular occasions in question. However, the court below by its charge deflected the jury from such a finding.

Thus, the testimony in this case indicated that the defendant Bovell, a seasoned mover of 18 years, was inured to variations in the circumstances surrounding the many moves completed by him and was mainly interested in finishing the job to get back to his wife and dinner. The jury was entitled to find that although a lawyer, accountant, gardener or another

called upon to help a friend move, might be curious as to what he was moving, Mr. Bovell, as a professional mover was not, and that such lack of curiosity on his part was not unreasonable. However, although the court below properly informed the jury that in order to convict the defendant Bovell, it must find that he "actually knew" that the goods in question were stolen, the court misled the jury in offering it a guideline as to how it could arrive at a conclusion of actual knowledge. Thus, the court informed the jury that it could predicate knowledge upon the fact that the defendant received the stolen property under circumstances which should convince a man of ordinary intelligence that it was stolen. However, this circuit has said that the guilty knowledge of the accused, himself, is the issue to be determined, and in this case, for example, the fact that the defendant Bovell showed no concern as to what he was moving is related to his experience as a mover rather than his intelligence. In commenting on such objective tests as the man of "ordinary intelligence", the court in Kasle v. United States, supra, stated:

"Plainly such tests as these of guilty knowledge on the part of the accused subjected him to a standard of conduct and of capacity to detect crime which the jury might conclude to be the standard of reasonable and honest men of average intelligence when acting under

circumstances like those which he found to have existed here. The effect of such tests was to charge the accused with guilty knowledge or not upon what the jury might find would have induced belief in the mind of a man such as they were told to consider, rather than the belief that was actually created in the mind of the accused; or, at last, the accused might be condemned even if his only fault consisted in being less cautious or suspicious than honest men of average intelligence are of the acts of others. The result of the rule of the charge would be to convict a man, not because guilty, but because stupid. The issue was whether the accused had knowledge - not whether some other person would have obtained knowledge - that the goods had been stolen. The circumstances must have had that effect upon the mind of the accused, to constitute knowledge in him. The issue must be determined upon the individual test of the accused. It may well be that the tests stated in the charge are proper enough to fix civil liability for the acts or omissions of a defendant, but hardly to fasten upon him an intent to commit a felony."

In the instant case, the defendant was prejudiced because the charge of the trial court directed the inquiry of the jury to a determination of the effect of the circumstances surrounding the possession of the stolen goods upon the mind of a person of ordinary intelligence, rather than upon the mind of Louis Bovell. Thus, the question of guilty knowledge was not

determined upon the individual test of the accused, taking into account any peculiarities of that individual, and in view of the defendant Bovell's unique experience, the charge of the court on this point was not only improper but a clearly prejudicial error in this case.

The court's charge with respect to knowledge was also deficient and confusing in other respects. The court instructed the jury that a defendant could not "intentionally remain ignorant of a fact" in order to escape the consequences of the criminal law. However, it would appear that if a defendant truly "remained ignorant" of the fact that the goods in question were stolen, he could not be convicted as one who "actually knew." The court's charge on this point is a confusing one.

Similarly, when the jury requested further instructions on the question of possession, the court failed to inform the jury that possession with guilty knowledge was an essential element of the offense charged. The court stated, "I am going to read to you first the charge with respect to possession. Now, this has nothing to do with knowledge." (T. 1520). Although the court had, of course, previously charged the jury with respect to knowledge, it is submitted that its failure to do so again, and

its disassociation of that question from that of possession at a time when the jury was obviously confused, merely added to the already existing confusion. Accordingly, the defendant submits, as a result of the errors set forth above, and in view of the "borderline" case against him (T. 956), he was severely prejudiced to an extent warranting a new trial.

POINT II

THE GUILT OF THE DEFENDANT
WAS NOT PROVEN BEYOND A
REASONABLE DOUBT.

The court below expressed reluctance to send the case against the defendant Bovell to the jury. The court stated: "It is a close question. I think the proof is borderline at best." (T. 956). However, the court eventually submitted the case for jury determination and the defendant was found guilty upon the two counts charged, conspiracy and unlawful possession. The defendant contends, as set forth below, that the evidence with respect to each count did not establish his guilt beyond a reasonable doubt.

A. The Evidence Did Not Demonstrate
the Defendant's Guilt of the Crime
of Conspiracy Beyond a Reasonable
Doubt.

The evidence in this case established only that the defendant Bovell assisted in loading and unloading stolen cartons. There was no evidence that the defendant was ever in any way informed that the cartons handled by him were stolen. He denied having such knowledge to the FBI and upon the trial. Thus, the main evidence against the defendant was the fact that he loaded and unloaded cartons without reading the labels thereon or inquiring as to their contents. As the defendant has discussed above, such a lack of curiosity was not unusual or unreasonable on the part of a person who had moved innumerable cartons for 18 years. In this case, there was no evidence that defendant knew of any plan or scheme or agreed to play any part in it.

Basic to the crime of conspiracy "is agreement among the conspirators to commit an offense." * "Where the crime charged is conspiracy, a conviction cannot be sustained unless the Government establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute. That has been the position of this Circuit, at least since Learned Hand's

* United States v. Falcone, 311 U.S. 205,
210 (1940).

opinion in United States v. Crimmins, 123 F.2d 271 (2d Cir. 1941), and the principle has been reaffirmed by this Court's recent decisions. E.g., United States v. Houle, 490 F.2d 167, 170, 172 (1973)." (citations omitted).*

In United States v. Tannuzzo,** the court held the evidence insufficient to convict the defendant of conspiracy where such evidence failed to show that the defendant was aware of interstate transportation and entered into a conspiracy with respect to such transportation. In the instant case, the defendant submits, there was no evidence that the defendant was aware of his co-defendants' plans and knowingly entered into a scheme to effect them. The court noted that any evidence against the defendant Bovell related only to the substantive charge (T. 956). However, in Crimmins, supra, "Judge Hand called attention that 'it does not follow, because a jury might have found him guilty of the substantive offence, that they were justified in finding him guilty of a conspiracy to commit it.' We note that the gist of the offense of conspiracy 'is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy.' United States v. Falcone, 311 U.S. 205, 210, 61 S.Ct. 204, 207, 85 L.Ed. 128.

* United States v. Cangiano, 491 F.2d 906 (2d Cir. 1974)

** 174 F.2d 177 (2d Cir. 1949)

See Rent v. United States, 5 Cir., 209 F.2d 893. One of the express or implied terms of the agreement must be to commit the federal offense. In addition to the leading case of United States v. Crimmins, supra, the following cases have held proof of the existence of such an agreement, either express or implied, necessary for conviction for conspiracy. United States v. Bollenbach, 2 Cir., 147 F.2d 199, 201; United States v. Sherman, 2 Cir., 171 F.2d 619, 623; United States v. Smolin, 2 Cir., 182 F.2d 782, 786; United States v. Cordo, 2 Cir., 186 F.2d 144, 147. See also, dissenting opinion of Chief Judge Hutcheson in Pereira v. United States, 5th Cir., 202 F.2d 830, 838. The Supreme Court's opinion in Pereira v. United States, 347 U.S. 1, at pages 11 and 12, 74 S.Ct. 358, at page 364, makes it clear that " * * * the charge of conspiracy requires proof not essential to the convictions on the substantive offenses - proof of an agreement to commit an offense against the United States- * * * " * Proof of such an agreement was not adduced in this case and, accordingly, the defendant submits, his guilt was not proven beyond a reasonable doubt. **

* Clark v. United States, 213 F.2d 63 (5th Cir. 1954)

** The defendant Grimsley whom the prosecutor stated had "a more serious problem than Mr. Bovell" (T 1434) was acquitted on the conspiracy count.

B. The Evidence Did Not Establish
the Guilt of the Defendant For
Unlawful Possession Beyond a
Reasonable Doubt.

There was no direct evidence of the defendant Bovell's guilty knowledge. He denied such knowledge to the FBI and in his testimony at the trial. Unlike other defendants in the case, Bovell was never informed by other participants in the crime that he was handling stolen goods. The evidence reveals no discussion in his presence which would give rise to guilty knowledge. Thus, the defendant's guilt rests upon circumstances which under the facts of this case can be and were reasonably explained.

The court below was disturbed by the flimsy nature of the case against Bovell. It stated:

"You know, Mr. Kimelman, the thing that troubles me about Mr. Bovell is, if you had been masterminding the scheme and gone out and hired Mr. Sperling to help you move cartons from trucks, it is entirely possible that Mr. Sperling, being the honorable gentleman he is and wanting to be nice to you and lend you a hand and earn an extra buck over the weekend, would help you unload cartons and not know anything about it.

"You are saying because you acted in a strange and mysterious way with respect to these goods the Court should say it is for the jury to determine whether Mr. Sperling knew, by reason of my mysterious activities the goods were stolen and it bothers me.

"Supposing you were caught in this kind of mesh. It's a pretty severe situation." (T.957)

The defendant Bovell took the stand and explained his participation in the loading of the stolen watches. He testified that he had assisted in the loading as a favor and to make some extra money. (T. 1091, 1093). He stated that he had previously assisted in moving property at the request of defendant Walsh and had been paid for such assistance. As a professional mover, he took no interest in the nature of the items moved and was never informed that such items were stolen. The defendant's explanation of his "possession" was a reasonable one. He contends that, based upon the evidence in the case, the jury should have concluded that his explanation might reasonably be true * and that, accordingly, a reasonable doubt existed. Thus, the court should have concluded that upon the evidence there must be a reasonable doubt in a reasonable mind. Under the rule enunciated by this court in United States v. Taylor,** therefore, the court committed error by its failure to find that a reasonable doubt existed with respect to the defendant's guilty knowledge.

* Defendant contends that the jury did not have to determine that such explanation was in fact true in order to acquit him.

** 464 F. 2d 240 (2d Cir. 1972)

CONCLUSION

The Court, in instructing the jury that it could determine that the defendant, Louis Bovell, had actual knowledge by concluding that a man of ordinary intelligence should have had it, committed error. Additionally, the guilt of the defendant was not proven beyond a reasonable doubt. The flimsy nature of the prosecution's case augments the gravity of the Court's error. The judgment of the court below should be reversed.

Respectfully submitted,

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STATE OF NEW YORK)
 :
COUNTY OF NEW YORK)

AFFIDAVIT OF PERSONAL
SERVICE

LUCIEN GEORGE , being duly sworn, deposes
and says that deponent is not a party to the action, is
over 18 years of age and resides at 702 Lenox RD.
Bklyn

That on the 9th day of July, 1976, deponent
personally served two true copies of the within Defendant-
Appellant Brief upon:

David G. Trager, Esq.
United States Attorney for
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Attorney for Appellee
United States of America

at the address designated by said attorney for that purpose.

Lucien George
Lucien George

Sworn to before me this
9th day of July, 1976

Martin H. Dlesch
Notary Public

MARTIN H. DLESCH
Notary Public, State of New York
No. 31402405
Qualified in New York County
Commission Expires March 30, 1977